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No. 203

OCTOBER TERM, 1921

Supreme Court of the United States

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY AND THE SUBURBAN ELECTRIC COMPANY,

Appellants,

vs.

THE CITY OF NEWPORT, KENTUCKY,

Appellee.

Brief for Appellants

RICHARD P. ERNST,
ALFRED C. CASSATT,
FRANK W. COTTLE,
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Attorneys for Appellants.

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This is an appeal from a judgment of the United States District Court for the Eastern District of Kentucky dismissing, for want of jurisdiction, an action in which appellants sought to enjoin appellee from removing a high-tension electric wire erected and maintained by appellants along certain streets in Newport, Kentucky.

The companies claimed the contract right under their franchises to maintain the wire; the City Board of Com-

missioners (the legislative body of the city) adopted a resolution directing its removal within ten days; the companies brought their suit alleging their contracts and that the action of the city was an impairment of their contracts in violation of Article I, Section 10 of the Constitution of the United States and a taking of plaintiffs' property without due process of law in violation of the Fourteenth Amendment; and that unless restrained by injunction the city would forcibly remove and destroy the wire to the plaintiffs' irreparable damage.

The court took the view that the resolution in question, a copy of which was attached to the bill as an exhibit (R. 6), did not "contemplate any action on behalf of the city toward removing it outside of the institution of legal proceedings having that end in view," that it was not, therefore, an impairment of plaintiffs' contracts, and dismissed the case on the authority of *Des Moines* v. *Des Moines City Ry. Co.*, 214 U. S. 179. (R. 17.)

We respectfully submit that the resolution here involved is wholly unlike the resolution in the Des Moines case; that it directly impairs a contract, and fairly implies summary action; that the bill alleges that the city intended forcible removal and destruction of the wire, and that the court erred in dismissing the case for want of jurisdiction.

THE FACTS

The decree (R. 18) and the certificate (R. 19) based the judgment of dismissal on the ground that

> "the matters and things set out in the pleadings in said cause do not present a controversy arising under the laws or Constitution of the United States and that this court is without jurisdiction of the same."

The following statement of facts is from the pleadings; the bill (R. 1), the answer (R. 10) and the amended answer (R. 14).

The South Covington & Cincinnati Street Railway Co. is a corporation organized under a special act of the General Assembly of Kentucky, with power to construct and operate a line or lines of street railway in the city of Newport. The city of Newport, by various ordinances referred to in the bill, granted to the predecessors of the South Covington & Cincinnati St. Ry. Co. and to that company, franchises under which, at the time of the filing of the bill, it was maintaining and operating street railway lines on the streets of the city of Newport. (R. 1-3.)

The Suburban Electric Company is a corporation under the laws of Kentucky, formed by the consolidation of several electric companies and having a franchise, granted June 19, 1890 (R. 3-4), to erect poles and wires on the streets and other public places in the city of Newport, Kentucky, for the purpose of supplying electric light, heat and power. The franchise grants the right to use all the streets, alleys and other public thoroughfares in the city of Newport, provided, that the company in placing its poles must erect them under the supervision of the City Engineer or whomsoever the Board of Councilmen may appoint for the purpose. The company erected its plant and has, for many years, maintained a system of poles and wires for the distribution of electricity in the city of Newport. (R. 4.)

The Street Railway Company is the owner of a power house in the city of Newport, wherein electric current is manufactured; a portion of the machinery in said power house belongs to the Electric Company and by contract between the two companies electric current for the operation of the street railway system and for the supply of

the customers of the Lighting Company has been for many years manufactured in said power house. (R. 4.)

It was deemed advisable and necessary that the parties should arrange for the purchase of additional current from the Union Gas & Electric Company in the city of Cincinnati, Ohio, because of the increased demand for electric current for the uses of the plaintiffs, the limited capacity of said power house and the fact that the power house is located near the Licking River, where at times it is invaded by flood from said river and from the Ohio River, interfering with the operation of the machinery in the power house. (R. 4-5.)

On or about the 3rd day of February, 1915, plaintiffs erected poles and wires and installed a wire from the Newport end of the Central Bridge (between Newport and Cincinnati), to the said power house over the route described in the bill; said route is on the edge of the city of Newport in the least thickly populated part of the city, and said wire was installed at a height thirty to fifty feet above the ground, carried on porcelain insulators securely fastened. Said poles were located and said wire installed under the supervision and direction and with the assent of the City Engineer, or Commissioner of Public Works of the city of Newport. Said wire was so installed as to avoid interference by flood conditions and is a great benefit to the city of Newport and its inhabitants and to plaintiffs in furnishing an additional or supplementary source of electric current in the event of floods, or in the event of any accident at the power house interfering with the production of electricity. The wire was erected at an expense, including the machinery for the use thereof, of not less than $28,000. (R. 5.)

On November 20, 1917, nearly three years after the wire was erected, the Board of Commissioners of New-

port adopted a resolution, a copy of which is as follows (R. 6):

> "Whereas the South Covington and Cincinnati Street Railway Company maintain a high-tension wire extending from the Central Bridge at Front Street in the City of Newport, Kentucky, to the power house of said company at Eleventh and Brighton Street in Newport, and
>
> "Whereas the said wire contains an electrical current of very high voltage and is dangerous to life and property, and
>
> "Whereas the removal of said wire is necessary to secure the safety of the lives and property of the citizens, be it
>
> "Resolved by the Board of Commissioners of the City of Newport, Kentucky, that the South Covington and Cincinnati Street Railway Company be directed to remove said wire not later than December 1, 1917, and that a copy of this resolution be sent to the South Covington and Cincinnati Street Railway Company.
>
> "Adopted by the Board of Commissioners November 20, 1917."

Plaintiffs alleged in their bill

> "that it is not true that said wire is dangerous to either life or property and that said resolution is unreasonable and in violation of the rights of plaintiffs as hereinabove set forth; that it is an impairment of the obligations of the aforesaid contracts and each of them, in violation of Article I, Section 10 of the Constitution of the United States, and is a taking of plaintiffs' property without due process of law in violation of the 14th Amendment to said Constitution of the United States."

Plaintiffs further alleged that

> "unless restrained by this court defendant will forcibly remove and destroy said wire thereby interfering with the operation of the street railway system and the electric lighting and power system above described, causing plaintiffs' injury which can not be compensated in money and to their irreparable damage."

The bill was filed on November 30, 1917, and a temporary restraining order issued.

On February 8, 1918, defendant filed an answer denying most of the allegations of the bill and alleging that the wire in question carried an electric current of very high voltage dangerous to life and property in the city of Newport.

The answer, however, does not deny the allegation of the bill above quoted, that "unless restrained by this court defendant will forcibly remove and destroy said wire," etc.

The pleadings stood in this shape until December 6, 1918, and in the meantime the testimony was taken and the case prepared for trial.

On December 6, 1918, the city filed an amended answer containing the following allegation:

> "That the enforcement of said resolution complained of in the bill herein, and the removal of the said poles and high-tension wire described in the bill, will not be attempted to be made by defendant, or any officer, or agent, or servant of said defendant, but will only be sought by and through an order of the Campbell Circuit Court, a court of competent jurisdiction, first had and obtained and after hearing, and of due and reasonable notice to all interested parties."

ARGUMENT

The opinion of the District Court is very brief and is as follows (R. 17):

> "This cause is before me on final hearing. I do not think that I have jurisdiction of the cause. No diversity of citizenship exists between the parties. The sole ground of jurisdiction is that it involves a federal question. There can be no doubt that the resolution complained of is a state law within the meaning of Section 10 of Article I of the federal constitution. But it does not impair the obligation of such contract as plaintiff has with defendant. It simply directs the plaintiff, Street Railway Company, to remove the high-tension wire complained of. It is based upon a denial of its right to maintain it. But the resolution does not contemplate any action on behalf of the city towards removing it outside of the institution of legal proceedings having that end in view. It is inconceivable that an attempt to remove it would be made in any other way. The case comes within the decision in the case of *Des Moines* v. *Des Moines City Ry. Co.*, 214 U. S. 179.
>
> "The cause is, therefore, dismissed for want of jurisdiction."

We respectfully submit that the court erred.

The wire in question had been erected under the authority of the ordinance of Newport of June 19, 1890, and with the approval of the City Engineer, as required by the terms of that ordinance. It had been maintained for nearly three years. The resolution of the commissioners recited that it was a danger to life and property and ordered its removal within ten days. In other words, the city undertook to terminate by force of said resolution a contract right theretofore acquired and enjoyed by the plaintiffs.

It was this resolution itself which purported to terminate and therefore impaired plaintiffs' contract rights.

The resolution did not question the legal right to maintain the wire, but ordered its removal as an exercise of the police power, on the claim that it was dangerous to life and property. The resolution did not direct the City Solicitor to present the question to a court for its adjudication; it undertook to adjudicate the question by the force of its own terms and arbitrarily directed the removal of the wire.

The allegations of the bill that plaintiffs had a contract right to maintain the wire; that it was not dangerous to life or property, show that the resolution was not a proper exercise of the police power and was itself an impairment of the contract.

These allegations present a case arising under the Constitution of the United States and properly invoke the jurisdiction of the District Court, even without the allegation of the bill that the city intended to forcibly remove and destroy the wire. But the allegation of such intention on the part of the city certainly precludes the contention, on the question of jurisdiction, that the resolution merely called for a law suit to determine whether or not a contract existed, and was not an impairment of the contract.

As the decision of the District Court seems to be based wholly on the doctrine of the Des Moines case, we first call the court's attention to what was involved in that case.

In the Des Moines case the resolution involved was as follows (214 U. S. 183):

> "Whereas: Questions have been raised as to the rights of the Des Moines City Railway Company and the Interurban Railway Company to maintain their tracks and operate their lines upon and along and

over the streets and bridges and public places of the City of Des Moines; and

"Whereas: It is essential to the preservation of the rights of the City of Des Moines that such questions be determined as speedily as possible.

"Be it Resolved by the City Council of the City of Des Moines: That said companies be and they are hereby ordered to remove all of their tracks, poles and wires from the streets, bridges and public places of the City of Des Moines, and to restore and repair the surface and pavement where paved of all of the streets along which they are now operating their lines, and said companies are hereby ordered to commence said removal within twenty-five days after the passage of this resolution.

"Be it Further Resolved: That should the said Railway Companies fail to commence such removal within the time above specified, the City Solicitor be and he is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution.

"Be it Further Resolved: That the City Clerk be and he is hereby instructed to serve a certified copy of this resolution upon the Des Moines City Railway Company and the Interurban Railway Company forthwith."

We call particular attention to the two features of the resolution upon which the court's decision was based.

1. The resolution recites as the occasion for its adoption that questions had been raised as to the rights of the Street Railway Companies to maintain their tracks along the streets of the city and that it is essential that those questions be determined as speedily as possible.

2. After ordering the removal of the tracks it directed the City Solicitor to take action to enforce the city's position.

This court said (184):

> "Leaving on one side all questions as to what can be done by resolution as distinguished from ordinance under Iowa laws, we read this resolution as simply a denial of the appellee's claim and a direction to the City Solicitor to resort to the courts if the appellee shall not accept the city's views. The resolution begins with a recital that questions as to the railway company's rights have been raised, and ends with a direction to the City Solicitor to take action to enforce the city's position. The only action to be expected from a City Solicitor is a suit in court. We can not take it to have been within the meaning of the direction to him that he should take a posse and begin to pull up the tracks. The order addressed to the companies to remove their tracks was simply to put them in the position of disobedience, as ground for a suit, if the city was right."

In the case at bar the resolution was of an entirely different character than that involved in the Des Moines case, especially in the particulars above referred to.

1. The resolution recites—not the existence of legal questions requiring settlement, presumably in court—but the existence of a danger which, if it existed, required prompt abatement.

It might be assumed, therefore, that the city officials would have met that alleged danger in the most summary manner.

2. There is no direction to the City Solicitor to take action and therefore no presumption that legal proceedings were all that was contemplated by the Commissioners. There was an arbitrary direction to the Street Railway Company to remove the wire within ten days.

The court could not assume that the city would not attempt to enforce the resolution except by proceedings in court. The resolution outlawed the wire after December 1, 1917, and assuming it to be valid, as the city officials doubtless did, they would have been authorized to remove the wire forcibly.

In *Iron Mountain Railroad Co.* v. *City of Memphis*, 96 Fed. 113, the city passed an ordinance requiring the railroad company to adopt certain rates by a specified date, and declaring that on failure of compliance the complainant's street rights should be deemed to be forfeited "and the city will then retake and resume its possession and control of said premises and rights and privileges in said contract granted, as if said contract had never been made."

The railroad company filed its bill in the United States Circuit Court to enjoin the enforcement of the ordinance. The city filed an answer denying, among other things, any threat "to forcibly dispossess the complainant of any of its property, or vested rights."

The lower court granted an injunction against any forcible action by the police or other officers of the city to oust the complainant company from its property rights, leaving it open to the city, however, to enforce the ordinance by action in court. Thereafter the city brought an action in the state court to enforce the ordinance and the United States Circuit Court refused to permit the railroad company to file an amended bill enjoining the prosecution of said action in the state court.

Both sides took an appeal to the Circuit Court of Appeals. The city appealed upon the claim that the court should not have granted any injunction at all. This appeal was denied. The company appealed on the ground that the lower court should have enjoined any action by the city under the ordinance, and this appeal was sustained.

The Circuit Court of Appeals, composed of Judges Taft, Lurton and Clark, said in its opinion by Judge Taft (p. 125):

> "We come now, however, to a much more difficult question, which arises on the appeal of the complainant below, the railroad company. The court below held that there was no jurisdiction under the bill, except that which arose out of the threatened taking possession of the street, and ousting the railroad company therefrom by force, without due process of law. It enjoined the city only from taking forcible possession of the street. This injunction might properly have been founded on the relative situations of the parties as they were admitted to be. The fact that the railroad company was in possession of the street, gained lawfully, and that the city could not rightly enforce a forfeiture without judicial proceedings, was a sufficient ground for granting the injunction which the court below granted; and it became immaterial, therefore, in furnishing this remedy, whether the railroad company had violated a condition forfeiting its estate. If the threatened use of the police to enforce the resolution of forfeiture was essential to the federal jurisdiction, then it would seem that the order of the court below disposed of the entire controversy before it. If, however, the resolution of the legislative council was a law of the state regulating interstate commerce, or was a law of the state impairing the obligation of contracts, or depriving a person of its property without due process of law, then the complainant could invoke the jurisdiction of the court below to enjoin its enforcement, *without regard to the method by which it was proposed to carry it into effect.*" [Italics ours.]

Also on page 130:

> "It impairs the obligation of a contract if it purports by force of law to authorize anyone to do that

which would be a breach of the contract. This the resolution certainly does, assuming the condition not to have been broken, for by declaring the revestiture of title and right of possession in the city, it authorized the city officers peaceably to take possession of the street, and to take up the tracks, and would doubtless authorize the bringing of suits by abutting owners for a nuisance peculiarly harmful to them."

Also on page 131:

"In the case at bar we have a law which, if that which is recited to be a fact by its terms is not a fact, purports to give state authority to commit acts which would be breaches of a contract. It purports to restore the street to the city, so that private citizens would be authorized thereby to treat the same as city property, and city officers would be authorized to take peaceable possession, peaceably to take up the tracks, and to remove other property of the grantee therefrom. It seems to us that this is a law impairing the obligation of a contract if founded on a non-existent breach of a condition."

So in this case we have a resolution "which, if that which is recited to be a fact by its terms is not a fact" (namely that the wire in question is a danger to life and property), "purports to give state authority to commit acts which would be breaches of a contract" * * * "and city officers would be authorized to take peaceable possession, peaceably to" remove the wire, etc.

In *Columbus Railway & Power Co.* v. *Columbus*, 249 U. S. 399, the court had under consideration an action brought by the Railway Company to enjoin the city of Columbus from enforcing ordinances which the company had theretofore accepted, but whose obligations it sought to escape because the fare prescribed in said ordinances

had become, under the changed conditions produced by the war, so inadequate as to be confiscatory.

There was no allegation or suggestion that the city of Columbus would undertake to enforce the ordinances except by appropriate litigation. The trial court said (253 F. 509): "The nature of the threats made and the means to which it is expected the city will resort to enforce its threats, are not stated or shown." The trial court held that it had no jurisdiction, saying (253 F. 509):

> "And even when the threatened act may be an impairment of a contract, or a deprivation of property without due process of law, still if the only means threatened to be used are resort to the courts or to legal proceedings, a case is not stated within the jurisdiction of a federal court."

The court dismissed the bill "both for want of jurisdiction and because no valid cause of action in equity is stated."

This court held that the District Court had jurisdiction saying (249 U. S. 406):

> "We are of opinion that there was jurisdiction in the District Court to entertain the bill as it presented questions arising under the Fourteenth Amendment to the Federal Constitution not so wholly lacking in merit as to afford no basis of jurisdiction. Jurisdiction does not depend upon the decision of the case, and should be entertained if the bill presents questions of a character giving the party the right to invoke the judgment of a federal court."

In *Eubank* v. *Richmond*, 226 U. S. 137, the court held that the municipal ordinance requiring the authorities to establish building lines on separate blocks back of the public streets and across private property, on the request

of less than all of the owners of the property affected, was in violation of the Fourteenth Amendment. The court in reaching its conclusion said:

> "We are testing the ordinance *by its extreme possibilities* to show how in its tendencies and instances it enables the convenience or purpose of one set of property owners to control the property rights of others," etc. [Italics ours.]

We cite this case merely as the basis for the argument that if, in determining the validity of municipal legislation, a court will test the same "by its extreme possibilities" the court may also determine by the same test its jurisdiction to enjoin the enforcement of such legislation.

We must not, however, overlook the direct allegation of the bill that unless restrained by injunction, the city would forcibly remove and destroy the wire, thereby interfering with the operation of the business of the companies and causing them irreparable damage.

While this allegation bore directly on the jurisdiction of the court, as a court of equity, it also contradicted and destroyed any implication that the resolution in question called for nothing but a law suit to test disputed rights.

The original answer of the city not only failed to deny the allegation of the bill that the city would forcibly remove and destroy the wire, but alleged affirmatively that its removal was "necessary to secure the safety of the lives and property of the citizens and inhabitants of the city of Newport." (R. 13.)

In *Vicksburg Water Works Company* v. *Vicksburg*, 185 U. S. 65, the Water Works Company had an exclusive franchise in Vicksburg. The Legislature of Mississippi authorized the city to issue bonds to purchase or construct a water works system. In pursuance to that act an elec-

tion was held and it was voted to issue bonds to buy or construct water works for the city and later the city council passed the following resolution:

> "Resolved, that the mayor be and is hereby instructed to notify the Vicksburg Water Works Company that the mayor and aldermen deny any liability upon any contract for the use of the water works hydrants; that from and after August, 1900, they will pay reasonable compensation for the use of said hydrants; *that the city attorney take such action as shall be necessary to determine the rights of the city in the premises.*" [Italics ours.]

The city also filed a suit in the state court to cancel and annul the contract, which suit was removed to the federal court and was pending on motion to remand.

Thereupon the company filed its bill in the federal court to restrain the city from assuming to abrogate and take away the franchises and contract rights of the complainant, and from attempting to coerce the company to sell its works to the defendant for an inadequate price, and to declare the act of the Legislature of Mississippi and the resolution and ordinance of council to be an impairment of the obligations of plaintiffs' contract, etc.

Objection was made to the jurisdiction of the court, as a federal court and as a court of equity, and the Circuit Judge dismissed the bill. On appeal to this court the judgment of dismissal was reversed. The court said on pages 81-82:

> "Whether this act of the Legislature of Mississippi is, in its terms, subject to those objections, or whether it may be regarded as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations, we need not determine

at this stage of the case, because we think that the ordinance of the city of November 7, 1900, whereby the mayor was instructed to notify the water works company that the mayor and aldermen deny any liability upon any contract for the use of the water works hydrants, and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct water works of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract; and that, therefore, unless the city can point to some inherent want of legal validity in the contract, or to some such disregard by the water works company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the circuit court as presenting a federal question.

* * * * * *

"It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city can not be the basis of enjoining such action, and that therefore the circuit court did right in dismissing the bill. We can not accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without war-

> rant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

The same case came before the court later on its merits in 202 U. S. 453, and the court again laid down the principle

> "it is a valuable feature of equity jurisdiction to anticipate and prevent threatened injury."

In the case at bar the resolution undertakes to terminate, because of its alleged dangerous character, the right of the companies to maintain the wire in question. The resolution does not expressly, or by implication, limit the city officials to litigation as the method of enforcement. On the contrary, the declaration in the resolution of an existing peril suggests the probability of summary action.

If the declaration of the existing peril is not true—and the bill alleges it is not true—then such resolution is an impairment of the contract rights claimed in the bill.

We submit that the jurisdiction and duty of the Federal Court in all such cases is clear. The case of *Des Moines* v. *Des Moines Railway Co.* is an exception to the general rule, based upon the very obvious indications in the resolution there involved, that the resolution was adopted solely for the purpose of settling disputed legal questions in the only way which they could be settled, namely, by a notice to vacate and a proceeding in court.

The allegation in the amended answer (R. 14)

> "that the enforcement of said resolution complained of in the bill herein and the removal of said poles and

> high-tension wire described in the bill will not be attempted to be made by defendant or any officer, or agent, or servant of said defendant but will only be sought by and through an order of the Campbell Circuit Court, a court of competent jurisdiction, first had and obtained and after hearing and of due and reasonable notice to all interested parties."

does not help the appellee on the question of jurisdiction.

We submit that where the city adopts a resolution which has the effect of impairing plaintiffs' contracts and whose enforcement is not limited by its own terms to action in court, and where the bill charges the defendant with the intent to forcibly remove the wire and such allegation is not denied in the answer of the defendant, the City Solicitor can not come in after the testimony is taken and defeat the jurisdiction of the court with an amended answer containing the allegation that it is not the intention of the city at that time to enforce the resolution except by a suit in court.

Neither the City Solicitor, who signed the amended answer, nor the Mayor, who verified it, had power or authority to so bind the city as to the method of enforcement of the resolution in question as to prevent the Police Department, for instance, from removing and destroying the wire by force.

The Statute of Kentucky, § 3235c-12, is as follows:

> "The Mayor and the four Commissioners shall constitute a Board of Commissioners. In this Board of Commissioners shall be vested all the legislative, executive and administrative power of the city, save as herein otherwise provided."

By Section 18 of the same Act, the Mayor is Commissioner of the Department of Public Affairs and some other

Commissioner must be designated as head of the Police Department under the title Superintendent of the Department of Public Safety.

The City Solicitor is not an officer of the city at all, but a mere employee. Section 19.

There is no allegation in the amended answer that the Board of Commissioners, having all the legislative, executive and administrative power of the city, took any action authorizing the statement set forth in the amended answer, or limiting in any way the method of enforcing the resolution here involved.

All other considerations aside, the failure of the city in its original answer to deny the allegation of the bill amounted to an admission that it was then the purpose of the city officials to "forcibly remove and destroy said wire." The effect of this allegation and admission in strengthening the jurisdiction of the court was not destroyed by the amended answer filed ten months later and purporting to state the present purpose of the city officials. There was no denial even in the amended answer that it was the original intention of the city to "forcibly remove and destroy said wire."

When the allegations of the bill show jurisdiction that jurisdiction can not be destroyed by the mere allegations of the answer, especially a belated amended answer.

As this court said in *Columbus Ry. & Power Co.* v. *Columbus, supra:*

> "Jurisdiction does not depend upon the decision of the case, and should be entertained if the bill presents questions of a character giving the party the right to invoke the judgment of a federal court."

We respectfully submit that the judgment of the court below should be reversed.

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